Smith and Johnson Construction Company *and* Transport Workers Union of America, Local 525, AFL–CIO. Case 12–CA–16987

October 31, 1997

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

DECISION AND ORDER

On March 12, 1996, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a brief in support of the exceptions and the judge's decision, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

1. In adopting the judge's finding that the Respondent, at its ground maintenance operations at Cape Canaveral, is a successor to U.S. Contracting Company, we note that the judge made the requisite finding, albeit not as part of his successorship analysis, that the 18 U.S. Contracting employees who the Respondent unlawfully refused to hire would have constituted a majority of the Respondent's 26-person work force. In making this finding, the judge properly included among the 18 U.S. Contracting employees five who were on layoff status from U.S. Contracting, with contractual recall rights, at the time they applied for employment with the Respondent. See *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. sub nom. *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1454–1455 (10th Cir. 1990); *Cincinnati Bronze*, 286 NLRB 39, 45–46 (1987).

2. We agree with the judge that the Respondent was obligated to recognize and bargain with the Union on and after March 1, 1995, the date that the Respondent began its ground maintenance operations at Cape Canaveral. The judge found that Local Union President Hill, in his telephone contacts with the Respondent, implicitly demanded recognition. While we agree with his finding, in our view it is not a necessary one. Rather, under the circumstances here, no bargaining demand was necessary, as the Respondent's unlawful refusal to hire all but one of its predecessor's employees rendered any request for bargaining futile. See *Triple A Services*, 321 NLRB 873, 877 fn. 7 (1996); *Precision Industries*, 320 NLRB 661, 711 (1996) (''The [r]espondent may not now claim that the Union did not officially demand recognition. Its calculated effort to destroy the representational status of the Union by virtue of an unlawful hiring process rendered any such effort a futility.''). It would be incongruous to require the Union to request the Respondent to recognize it when the work force the Respondent actually employed, by virtue of its discriminatory hiring process, included only one former U.S. Contracting employee.

3. The General Counsel excepts to the failure of the judge's recommended Order to require that the Respondent rescind any unilateral changes it made and to make employees whole for any economic loss they suffered as a result of such changes. The General Counsel contends that when a successor employer unlawfully discriminates in hiring to avoid a bargaining obligation, the successor employer is not free to set initial terms and conditions of employment unilaterally. The General Counsel further contends that, although there is no evidence that the Respondent changed terms and conditions of employment from those that were in effect at the time that U.S. Contracting ceased operation, we nevertheless should provide a remedy for such unilateral changes because such changes will likely be discovered in the compliance phase of this proceeding.

We agree with the legal principle cited by the General Counsel that a successor employer that unlawfully discriminates to avoid a bargaining obligation is not free to set unilaterally initial terms and conditions of employment. We, however, find no basis for applying that principle in this case, because, as the General Counsel admits, there is no evidence that the Respondent changed terms and conditions of employment from those that were in effect at the time that U.S. Contracting ceased operation. It is axiomatic that we cannot order a remedy for a violation that has not been established.[4] Although our decision in *U.S. Marine Corp.*,

[1] The Respondent's motion to strike the General Counsel's brief is denied as without merit.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent engaged in interrogation of employee applicants, Chairman Gould finds it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[3] We shall modify the judge's recommended Order to reflect the revisions to the remedy, discussed herein, and to comport with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

We grant the General Counsel's exception to the portion of the judge's recommended Order requiring the Respondent to offer employment to discriminatees. The recommended Order misspells two of the discriminatees' names and fails to require that the discriminatees be offered employment in the job classifications that they formerly occupied unless the Respondent no longer employs anyone in those job classifications. We shall correct these errors.

[4] Sec. 10(c) of the Act states in part:

293 NLRB 669 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991)(en banc), found that it was unnecessary for a complaint to allege an 8(a)(5) unilateral change violation when the complaint did allege that the successor employer's refusal to recognize and bargain with the Union violated Section 8(a)(5), it did not go so far as to find that no evidence of the unilateral change need be shown at hearing. Unlike *U.S. Marine Corp.*, in the present case no unilateral changes were shown to have occurred. Accordingly, we find that the General Counsel's exception is without merit.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Smith and Johnson Construction Company, Cape Canaveral, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Transport Workers Union of America, Local 525, AFL–CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time lawn maintenance employees, including equipment mechanics, tractor operators, laborers, full-time temporary laborers, and lead persons; but excluding all other employees, managerial employees, clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to hire or otherwise discriminating against employees in their hire or tenure of employment because they are members of Transport Workers Union of America, Local 525, AFL–CIO or any other labor organization.

(c) Interrogating employee applicants about their union membership, activities, and sympathies.

(d) Impliedly threatening employee applicants with reprisals because of their union membership, activities, and sympathies.

(e) Directing its employees not to talk to anyone about the Union.

(f) Directing its employees to report communications from any individuals concerning the Union to the Company.

(g) Informing its employees it refused to hire applicants because of their membership in, activities on behalf of, and sympathies for the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full employment to Donald Brands, Walter Brooken, William B. Chapman, Tim Claiborne, Derrick Fowler, Craig Graham, James Guy Jr., Melvin Haynes, Kenneth L. Kellem, Frank H. Major, John Monseur, Thurman Purdiman, Floyd D. Rachels, Charles Reed, Joel Reed, Edwin Robles, Kevin Rocha, and Samuel E. Smith in the job classifications that they formerly occupied for U.S. Contracting, or if the Respondent no longer employs employees in those job classifications, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary employees hired in their place.

(b) Make whole Donald Brands, Walter Brooken, William B. Chapman, Tim Claiborne, Derrick Fowler, Craig Graham, James Guy Jr., Melvin Haynes, Kenneth L. Kellem, Frank H. Major, John Monseur, Thurman Purdiman, Floyd D. Rachels, Charles Reed, Joel Reed, Edwin Robles, Kevin Rocha, and Samuel E. Smith for any loss of pay they may have suffered as a result of discrimination against them in the manner described in the remedy section of the judge's decision.

(c) Recognize and, on request, bargain collectively with Transport Workers Union of America, Local 525, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit described in paragraph 1(a) above, and, if an agreement is reached, embody that agreement in an executed written contract.

(d) Within 14 days from the date of this Order, remove from its files all references to its unlawful refusal to hire the discriminatees named above for its Cape Canaveral Air Force Station Florida operation and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its office and place of business at Cape Canaveral Air Force Station Florida copies of the attached notice

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If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER FOX, dissenting in part.

Contrary to my colleagues, I find merit in the General Counsel's exception regarding the judge's failure to order the Respondent to rescind any unilateral changes it has made since its unlawful refusal to recognize and bargain with the Union on and after March 1, 1995, and to make whole its employees for any economic losses they may have suffered as a result of such changes. My colleagues and I agree that the Respondent, as a successor employer that unlawfully discriminated in hiring to avoid a bargaining obligation, was not free to set initial terms and conditions of employment unilaterally. My colleagues refuse, however, to order the Board's traditional remedy-that the successor reinstate the predecessor's terms and conditions of employment and make the employees whole for any detrimental changes to their employment conditions[1]-because there was no evidence introduced at the hearing to establish that the Respondent made any unilateral changes.

My colleagues have confused the General Counsel's obligation to introduce evidence in support of the complaint allegations with the Board's obligation to fashion a remedy which fully restores the status quo ante prior to the Respondent's commission of unfair labor practices. At the hearing establishing a successor's bargaining obligation, the General Counsel is required to introduce evidence of unilateral changes only where he has alleged the unilateral changes as separate unfair labor practices in addition to the successor's general obligation to recognize and bargain with the union. The absence of such complaint allegations or evidence introduced at the hearing, however, in no way affects the successor's legal obligation to restore the status quo ante by reinstating the predecessor's terms and conditions of employment or the Board's obligation to include such a provision in its order. This point was made expressly by the Board in *U.S. Marine Corp.*, 292 NLRB 669, 672 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), in which it stated that the *Love's Barbeque* remedy requiring reinstatement of the predecessor's terms and conditions of employment need not ''rest on a separate finding that the Respondents committed a separate unfair labor practice by unilaterally changing employment terms. The illegality of such changes is subsumed in the broader Section 8(a)(5) and (3) allegations and violations found in this case.''

Accordingly, to fully remedy the Respondent's unfair labor practices and restore as nearly as possible the situation that would have prevailed but for the Respondent's unfair labor practices, I would modify the judge's recommended Order to require that the Respondent, on the Union's request, reinstate its predecessor's terms and conditions of employment and make the unit employees whole for any detrimental changes to their employment conditions.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
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> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
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> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with Transport Workers Union of America, Local 525, AFL–CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] See, e.g., *NLRB v. Staten Island Hotel*, 101 F.3d 858, 862 (2d Cir. 1996), enfg. 318 NLRB 850 (1995); *Galloway School Lines*, 321 NLRB 1422, 1428 (1996); *Sierra Realty Corp.*, 317 NLRB 832, 836 (1995); *State Distributing Co.*, 282 NLRB 1048 (1987); *Love's Barbeque Restaurant*, 245 NLRB 78 (1979).

All full-time and regular part-time lawn maintenance employees, including equipment mechanics, tractor operators, laborers, full-time temporary laborers, and lead persons; but excluding all other employees, managerial employees, clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to hire or otherwise discriminate against job applicants to avoid bargaining with the Union.

WE WILL NOT interrogate employee applicants about their union membership, activities, and sympathies.

WE WILL NOT impliedly threaten employee applicants with reprisals because of their union membership, activities, and sympathies.

WE WILL NOT direct you not to talk to anyone about the Union.

WE WILL NOT direct you to report communications from any individuals concerning the Union.

WE WILL NOT inform you that we refused to hire applicants because of their membership in, activities on behalf of, and sympathies for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full employment to Donald Brands, Walter Brooken, William B. Chapman, Tim Claiborne, Derrick Fowler, Craig Graham, James Guy Jr., Melvin Haynes, Kenneth L. Kellem, Frank H. Major, John Monseur, Thurman Purdiman, Floyd D. Rachels, Charles Reed, Joel Reed, Edwin Robles, Kevin Rocha, and Samuel E. Smith in the job classifications that they formerly occupied for U.S. Contracting, or if we no longer employ employees in those job classifications, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary employees hired in their place.

WE WILL make Donald Brands, Walter Brooken, William B. Chapman, Tim Claiborne, Derrick Fowler, Craig Graham, James Guy Jr., Melvin Haynes, Kenneth L. Kellem, Frank H. Major, John Monseur, Thurman Purdiman, Floyd D. Rachels, Charles Reed, Joel Reed, Edwin Robles, Kevin Rocha, and Samuel E. Smith whole for any loss of earnings and other benefits resulting from our failure to hire them, less any net interim earnings, plus interest.

WE WILL recognize and, on request, bargain with Transport Workers Union of America, Local 525, AFL–CIO and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our refusal to hire the individuals named above, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that our refusal to hire them will not be used against them in any way.

SMITH & JOHNSON CONSTRUCTION COMPANY

David S. Cohen, Esq., for the General Counsel.
Leo P. Rock Jr., Esq., for the Respondent.
Richard Siwica, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. In this unfair labor practice prosecution the General Counsel (the Government) of the National Labor Relations Board (the Board) alleges that Smith & Johnson Construction Company (the Company) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). All allegations relate to or are intertwined with the Company's being awarded business previously performed by U.S. Contracting Company (U.S. Contracting) which provided grounds maintenance services at the United States Air Force Station (Air Force) located at Cape Canaveral, Florida (Cape).

On July 28, 1995,[1] the Regional Director for Region 12 of the Board acting in the name of the General Counsel issued a complaint and notice of hearing (complaint) against the Company.[2] I heard the case in trial in Rockledge, Florida, on September 21, 22, and 26.

The complaint, as amended at trial, alleges in the independent 8(a)(1) counts that the Company through two specifically named agents on or about mid-February unlawfully interrogated employee applicants; on or about mid-February impliedly threaten employee applicants with unspecified reprisals; on or about mid-March and mid-April directed its employees to report to the Company any communication from any individuals concerning the Union; on or about mid-March and mid-April directed its employees not to talk to anyone about the Union; informed its employees in mid-March that it refused to hire applicants because of their membership in and activities on behalf of the Union; directed its employees in late May—early June to report to the Company any communications from any individuals concerning the Union; directed its employees in late May or early June not to join the Union; and informed its employees it had refused to hire applicants because of their membership and activities on behalf of and sympathies for the Union. The 8(a)(3) counts in the complaint, as amended, alleges that on or about March 1, the Company failed and refused to consider and/or hire 19 applicants who submitted job applications to the Company in February.[3] It is alleged the Com-

[1] All dates hereinafter are 1995 unless I specify otherwise.

[2] The complaint traces from an original unfair labor practice charge filed by Transport Workers Union of America, AFL–CIO, Local 525 on March 10 and amended on April 24, May 26, June 19 and 27, and July 14.

[3] In its posttrial brief the Government moved to withdraw from the complaint the name of Michael St. Jean based on a lack of evidence

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pany failed and refused to consider for hire or to hire the following specifically named job applicants in order to discourage employees from joining the Union or engaging in protected concerted activities and to avoid a bargaining obligation with the Union. The job applicants named in the complaint are:

Donald Brands	Frank H. Major
Walter Brooken	John Monseur
William B. Chapman	Thurman Purdiman
Tim Claiborne	Floyd D. Rachels
Derrick Fowler	Charles Reed
Craig Graham	Joel Reed
James Guy Jr.	Edwin Robles
Melvin Haynes	Kevin Rochen[4]
Kenneth L. Kellum	Samuel E. Smith

The 8(a)(5) count in the complaint, as amended, alleges the Company has since on or about March 1, failed and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in a specifically described unit.

The Company's answer to the complaint in conjunction with admissions[5] made at trial and/or in its posttrial brief establishes the Board's jurisdiction is properly invoked[6] and that the Union is a labor organization[7] within the meaning of the Act.

I have studied the entire record, the parties posttrial briefs, and legal authorities cited there. Based on that study and my assessments of each witnesses testimony, I reach the following findings and conclusions, including the ultimate conclusion, that the Company committed unfair labor practices, for the greater part, as alleged in the complaint.

I. THE FACTS

A. *Background and Overview*

The Company is a disadvantage minority business enterprise headquartered in Columbus, Ohio, and is primarily engaged in heavy highway (bridge, culvert, and roadway excavation as well as installation of guard rails) construction in Ohio, Indiana, Kentucky, and West Virginia.

In its answer to the complaint and at trial the Company denied it is a successor employer to U.S. Contracting—the employer previously performing grounds maintenance services at the Cape and other geographic areas along the eastern coast of Florida. However, in its posttrial brief the Company acknowledges it is the legal successor to U.S. Contracting.[8]

U.S. Contracting performed grounds maintenance services at the Cape from 1990 until February 28, 1995. On September 10, 1991, the Board (Region 12) certified the Union (Case 12–RC–7450) as the collective-bargaining representative of U.S. Contracting employees in an appropriate unit. U.S. Contracting and the Union entered into collective-bargaining agreements the most recent of which was executed on August 11, 1994, and by its terms is effective from October 1, 1994, until September 30, 1997. The parties acknowledge, as alleged in the complaint, that the following employees of the Company constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time lawn maintenance employees, including equipment mechanics, tractor operators, labors, full-time temporary labors and lead persons; but excluding all other employees, managerial employees, clerical employees, guards and supervisors as defined in the Act.[9]

The Air Force gave notice in March 1994 to all interested parties, including U.S. Contracting, the incumbent contractor, that it intended to open the contract for grounds maintenance services at the Cape. The Air Force issued a solicitation for bids for the grounds maintenance services in question on June 27, 1994. Among other items the bid solicitation package contained a copy of the collective-bargaining agreement between U.S. Contracting and the Union.

U.S. Contracting's contract with the Air Force expired on September 30, 1994; however, it was extended on a month-to-month basis until February 28.

The Company hired David Potts as a consultant (Consultant Potts) to assist it in formulating its bid package for the grounds maintenance services at issue here.[10] The Company submitted its bid package to the Air Force on November 22, 1994.[11] The Company's bid was for a performance period from January 1, 1995, until September 30, 1999, inclusive.[12] On February 3, the Air Force awarded its grounds maintenance services contract for the Cape to the Company here.

On either February 3 or 4, Company Vice President Jeffery Johnson (Company Vice President Johnson) telephoned Consultant Potts and advised him the Company had been

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that St. Jean ever applied for a position with the Company. I grant the Government's request with respect to St. Jean.

[4] This individual is also referred to in the record as Rocha.

[5] Certain other trial or pretrial admissions by the Company will be set forth elsewhere in this decision.

[6] The complaint alleges, the evidence establishes, the Company admits and I find it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[7] The complaint alleges, the evidence establishes, the parties admit, and I find the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[8] The Company acknowledges it continued the predecessor's business without interruption or substantial change; that its employees are performing the same jobs with the same working conditions as the predecessor and that the predecessor's project manager was hired as its project manager with day-to-day supervisory control. The Company acknowledges it purchased most of the equipment of the predecessor employer and utilizes the same major parts suppliers that its predecessor did. The evidence establishes, the Company admits, and I find, it is a successor employer to the U.S. Contracting.

[9] The most recent collective-bargaining agreement between U.S. Contracting and the Union at Appendix A sets forth the following job classifications: equipment mechanics, tractor operators, laborers, full-time temporary laborers, and leadpersons.

[10] Potts is the president and owner of D. M. Potts Corporation headquartered in Melbourne, Florida. D. M. Potts Corporation provides grounds maintenance services for the Air Force at Patrick Air Force Base which is located a few miles south of the Cape. It is admitted that at all times material, Consultant Potts was an agent of the Company within the meaning of Sec. 2(13) of the Act.

[11] U. S. Contracting chose not to bid for a renewal contract with the Air Force.

[12] As noted elsewhere in this decision the awarding of the contract by the Air Force was, for reasons not fully explained on this record, delayed until February 28.

awarded the contract. Potts was given complete authority to hire employees for the Company at the Cape and to oversee the day-to-day operations of the contract.

Company Vice President Johnson testified he did not give Consultant Potts any instructions regarding hiring.

On or about February 3 or 4 Potts delegated all hiring authority for the Company to his Project Manager David Gremonprez (Project Manager Gremonprez).[13]

B. *Hiring a Work Force for the Cape*

During the first full week in February, Consultant Potts and Project Manager Gremonprez began the process of hiring a work force for the Company. On or about February 8, Potts formulated an advertisement for applicants which was placed in the *Florida Today* newspaper starting on February 10 running through February 12. The advertisement reads as follows:

> Grounds maintenance (Cape Canaveral Air Station and Patrick AFB). Local contractor will be accepting applications on Feb. 13–15 during the hours of 8:00–12:00 noon at building 958, Patrick AFB, FL. Previous experience required. We offer attractive wages, paid holidays, and profit sharing. Become part of our team. E.O.E drug free workplace.

According to Project Manager Gremonprez the first advertisement was incomplete; therefore, the newspaper ran the advertisement again on February 17, 18, and 19. The second advertisement specified the positions of ''Grounds Laborer, Tractor Operators, and Mechanics'' and listed interview dates of February 21–22, otherwise the second advertisement was identical to the first one.

Company Vice President Johnson testified U.S. Contracting President Brands (U.S. Contracting President Brands) telephoned him sometime around February 3 and expressed an interest in selling U.S. Contracting's equipment to the Company herein. Johnson also stated U.S. Contracting President Brand specifically mentioned the 580–D tractor operators stating they were good workers. Johnson, however, stated that was not the focus of their telephone conversation.[14]

On February 8 Consultant Potts and Project Manager Gremonprez met with U.S. Contracting President Brands to look at the equipment Brands was interested in selling. After they examined the equipment Brands offered to show Potts and Gremonprez all of U.S. Contracting's books and records including the personnel files of its employees. Potts testified Brands ''mentioned something about the employees . . . which one's were good and which one's . . . I can hire, which one's I shouldn't.'' Potts said he did not accept Brands' offer to examine the personnel files because that was not the purpose of his visit and that he ''just kinda shrugged [Bands] off when he talked about those [personnel] files because [he] felt a little bit uneasy just somebody mentioning personnel files.''[15]

U.S. Contracting President Brands testified that neither Consultant Potts nor Project Manager Gremonprez asked him to tell the U.S. Contracting employees when, where, or even that the Company would be interviewing applicants for hire. U.S. Contracting employees learned of the interviews from the newspaper advertisements, talking with each other, and as testified to by U.S. Contracting employee Kenneth Kellum, a copy of one of the newspaper advertisements was placed on the chalk board at U.S. Contracting.[16]

Air Force Quality Assurance Evaluator for Grounds Maintenance at the Cape Bart Menga[17] testified he served in that capacity during the last 8 months of the U.S. Contracting contract with the Air Force. Menga testified that during the ''start up phase'' (February 28 to March 1) for the Company here, he spoke with various Company representatives, namely, Potts, Gremonprez, and Mark Blotti.[18] Menga said he welcomed Consultant Potts and offered to answer any questions Potts might have regarding his Company's servicing of the contract. Menga testified Consultant Potts asked if U.S. Contracting had performed the contract satisfactorily. Menga told Potts they had. Menga testified he took Project Manager Gremonprez on a tour of the Cape ''and looked at all the different areas . . . we talked about cutting here . . . cutting there . . . getting in there . . . getting in here . . . .'' Menga said he talked with Gremonprez and Blotti specifically about the operator of the mound mower. Air Force Quality Assurance Evaluator Menga said, ''[T]he mound mower was a pretty important person in a grounds maintenance contract . . . at [the] Cape.'' According to Menga, Project Manager Gremonprez asked if U.S. Contracting had a mound mower and Menga told Gremonprez they did. Menga said he specifically told Company Quality Assurance Representative Blotti that if the Company was going to pick up any employee from U.S. Contracting it should be the mound mower person, ''because of his experience and his . . . special mowing techniques.''[19]

On or about February 13 the Company reached an agreement to purchase grounds keeping equipment from U.S. Contracting. The Company purchased: ''six large tractors'' equipped with ''bat wings'' that have ''15 foot'' cutting stands; ''two tractors . . . 580–D's''; ''[a] welder, a torch . . . some jacks, miscellaneous shop tools . . . a drill press . . . [and] . . . one trailer.''

[13] It is admitted that at all times material, Gremonprez was an agent of the Company within the meaning of Sec. 2(13) of the Act. Gremonprez became the project manager at the Cape for the Company here on or about March 1; however, he remained project manager for D. M. Potts Corporation at Patrick Air Force Base.

[14] Company Vice President Johnson and U.S. Contracting President Brands both testified regarding a meeting between them in February in Florida. According to Johnson, Brands again mentioned the 580–D tractor operators that worked for U.S. Contracting. Brands testified:

> We talked about the equipment, about purchasing some of the equipment. And I spoke to him, also, about the possibility of hiring some of the employees, specifically Kirt Gopel, Derrick Fowler, and Frank [Major].

[15] Potts explained he felt uneasy, because he considered personnel files to contain privileged information.

[16] U.S. Contracting President Brands testified no one from the Company sought permission to interview the U.S. Contracting employees at U.S. Contracting's facilities.

[17] Menga described his duties, in part, as making random unannounced inspections of the grounds at the Cape and handling Air Force complaints, if any, regarding grounds maintenance services.

[18] Menga testified Blotti identified himself as the Company's security and quality assurance representative.

[19] Derrick Fowler was the mound mower operator for U.S. Contracting.

Local Union President Eddie Hill testified that approximately during the second week in February he received a telephone call from Air Force Labor Relations Advisor Jesus Pernas-Giz (Air Force Advisor Pernas-Giz) that the Company had been awarded the grounds maintenance services contract at the Cape. Hill testified he learned the Company was headquartered in Ohio and through directory assistance obtained the Company's telephone number. Hill telephoned the Company on February 13, according to telephone company produced records. Hill said he spoke with a male person. Hill explained to the male person that he was president of the Local Union that represented the employees at the Cape. Hill testified:

> I asked him to hire the existing Union work force. I gave him several reasons why I thought it was not only good for me, but good business for him. Among those reasons Dennis Brands very early in his career had put a great deal of effort into making sure that he had a good work force.
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> And prior to the Union coming in, culling people that he didn't consider appropriate workers. And he had put a great deal of effort into it and there was a really good work force out there. And I told him that.
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> I also talked to him about security clearances, experience, knowledge of the area, and all those reasons that I thought that he should hire the Union work force.
>
> And the phone call was very cordial. He was friendly. He said, yes, I understand those things. He told me that Smith & Johnson is certainly not an anti-union Company, but they had—the decision for hiring had been placed in the hands of a what he referred to as local hiring authority, and he would direct the local hiring authority to get in contact with me to discuss these things with me. And he took my name and phone number. And I waited for the local hiring authority to contact me.

President Hill testified that when the Company did not, as promised, contact him he on February 27 again telephoned the Company at its Ohio headquarters and spoke with a male person whose name he did not ascertain. Hill testified:

> I said, this is Ed Hill, I'm the President of Local 525, Transport Workers Union, who represents the people on the grounds maintenance contract at Cape Canaveral Air Station that I talked to you about hiring before. And you had told me that you had a local hiring authority and that the local hiring authority would contact me. And I have received no contact from the local hiring authority.
>
> They then said something—They answered me back by saying, well, let me give you his number and you contact him. At that time he told me that the local hiring authority was D. M. Potts. And he gave me a phone number.

Hill testified he telephoned Consultant Potts whom he already knew[20] and told Potts he was the president of the Local Union representing the employees on the existing grounds maintenance services contract at the Cape. Hill told Potts he had telephoned Ohio and had been expecting a call from Potts.[21] Hill testified, ''I asked him . . . to hire the existing union work force in this contract.'' Hill testified:

> Mr. Potts told me that the hiring decision had already been made. And I asked him then, did you hire the existing Union work force. And he said, I believe we hired one of them. And I asked him who they hired. And he said, I believe we hired the mechanic. And I said, you mean you hired the only guy out there who is not a member of the Union.
>
> And I asked him what criteria they used for selecting people. He told me that they hired the best people based on experience and the interview. And I said, you mean to tell me that you found people in this area that are more experienced at cutting the Cape than the people who've been doing it for the last several years. And he said, well, we are in the fortunate position in this area that we have a great deal of unemployment, so, therefore, when I put ads in the paper, I got—I think he said over 200 applications. So I had a wide selection of people to select from.

Company Vice President Johnson testified he received a telephone call in February from an individual who identified himself as Eddie Hill, president of the Local Union, ''and he wanted to know what our labor plans were.'' Johnson told Hill that Consultant Potts was doing the hiring and Hill told Johnson he knew Potts. Johnson testified that when Hill started telling him the benefits of being union he told Hill ''we're Union in Ohio'' ''we're signatory to several collective bargaining agreements.'' Johnson testified this was the only telephone call he had from Hill, and he never told Hill he would have Consultant Potts telephone him. Johnson testified he never thereafter heard from or received anything from the Union.

Consultant Potts testified he received a telephone call from Local Union President Hill who wanted to know if the Company was going to hire the predecessors' employees. Potts told Hill the hiring decisions had already been made. Hill wanted to know why the experienced U.S. Contracting employees had not been hired. Potts told Hill the U.S. Contracting employees had received applications and had been interviewed. According to Potts, Hill seemed ''up set or disturbed'' ''as to why we didn't hire any of the [U.S. Contracting] employees.'' Potts further testified:

> And from that point on I told him that we had retained counsel. I believed I heard at that time about the possibility of a strike. And I said I didn't have any more to say or discuss.

Air Force Quality Assurance Evaluator Menga testified he spoke on numerous occasions during the phase-in period with Company Security and Quality Assurance Representative Blotti. He said they ''primarily'' discussed ''badging'' or obtaining security clearances for the Company's employees. Menga explained that all employees needed a ''badge''

[20] Hill testified he knew Consultant Potts' Company had a contract to do grounds maintenance services at Patrick Air Force Base.

[21] According to Consultant Potts the Company's Ohio office had provided him with Local Union President Hill's telephone number but he had never found time to call Hill.

to be admitted to the Cape and that those employees that were ''required to perform grounds maintenance services in restricted or controlled areas'' would be required to obtain security clearances. Menga said he explained to Blotti that if the Company hired U.S. Contracting employees the Company would simply need to supply a letter to the Air Force identifying those employees ''since they already had their security badges . . . [and] already had their investigations completed and they already had access to restricted and controlled areas.'' Menga told Blotti that if the Company hired the U.S. Contracting employees it would just be a matter of changing the employees names on their badges and security passes. Menga said he also explained to Blotti that if the Company hired employees that did not already have security clearances, time consuming background investigations would be conducted on those employees by the Air Force.

C. *The Interviewing Process*

Project Manager Gremonprez conducted all interviews at D. M. Potts Corporation facilities, Patrick Air Force Base. Gremonprez made notes contemporaneously with or immediately after interviewing each applicant. Each interview lasted approximately 3 to 5 minutes. It appears Gremonprez distributed approximately 205 applications and interviewed approximately 183 applicants[22] including the 18 former U.S. Contracting employees named in the complaint. The 18 former U.S. Contracting employees are Donald Brands, Walter Brooken, William B. Chapman, Tim Claiborne, Derrick Fowler, Graig Graham, James Guy Jr., Melvin Haynes, Kenneth L. Kellum, Frank H. Major, John Monseur, Thurman Purdiman, Floyd D. Rachels, Charles Reed, Joel Reed, Edwin Robles, Kevin Rochen, and Samuel E. Smith. (Although Michael St. Jean is listed in the complaint his name was amended out of the complaint by the Government.)

At the time U.S. Contracting concluded its work at the Cape it had 13 bargaining unit employees on its payroll and 6 additional employees (including Michael St. Jean) who for 1 year had contractually provided recall rights.

Project Manager Gremonprez testified he considered certain criteria in selecting which applicants to hire:

> Appearance, the way they carried themselves. In other words, did they look at me when I was speaking with them. Their demeanor, were they courteous, their experience level.

Gremonprez state he considered ''proper appearance'' to be a ''neat'' appearance with shirts ''tucked in'' and ''buttoned up.'' Gremonprez further testified:

> We're looking for people who are polite, who are neat, who are clean-cut, who speak well, who just in general portray the image that we want . . . .

Gremonprez explained his interview process as follows:

> It was not my intention for this to be an extensive interview. It was my intention for this to be initial interview, to look at their applications, look at their—at whatever resumes they brought in or letters of recommendation. And if I had questions, I would ask questions.
>
> The other purpose of the interview was for me to physically look at them, physically meet them, see how they carried themselves, were they neat, how did—were they—did they speak well. I mean, in other words, did they carry themselves well. General demeanor, general appearance.
>
> Did they look at their feet when they were talking to me. Did they look at me in the eye. And back to the old, you know—I shook hands with all of them. So I suppose . . . that may have played a part in my thought process, too, what kind of handshake did they have.

Gremonprez testified he gave the following weight to an applicant's ''experience'':

> Well, it [experience] fit in with the other five or six factors that I was looking at. It [experience] wasn't necessarily the determining factor. It wasn't given any greater weight than anything else.
>
> When you're looking for laborers, which is the biggest majority of the people out there, experience on a lawn maintenance crew would obviously be helpful because the equipment would be very, very similar.
>
> Primarily when you're looking for a tractor driver, you're not looking for a lawn maintenance person. You're looking for somebody who's got tractor experience. And that lends itself more to agriculture. The AG experience would have been very important in trying to find tractor drivers.

All 18 (Charles Reed, John Monseur, Samuel E. Smith, James Guy Jr., William B. Chapman, Floyd D. Rachels, Thermon Purdiman, Melvin Haynes, Craig Graham, Tim Claiborne, Joel Reed, Kenneth L. Kellum, Frank H. Major, Kevin Rochen, Derrick Fowler, Edwin Robles, Walter Brooken, and Donald Brands) of the U.S. Contracting bargaining unit employees on active payroll or layoff status as of February 28 made application with and were interviewed by Gremonprez during February 13 to 15.

As noted elsewhere in this decision, Project Manager Gremonprez made brief notes during or immediately following his interview of each applicant. Gremonprez noted on 16 of the 18 predecessor employees the fact they had been employed by U.S. Contracting. On the two remaining individuals Gremonprez noted that Donald Brands was U.S. Contracting President Brands' brother and that William Chapman was President Brands' brother-in-law.

D. *The Interview with and Experience of the U.S. Contracting Employees*

On his application for employment with the Company Donald Brands listed, among other experience, 3 years of grounds maintenance work at the Cape. Brands submitted a letter of reference that reads in part:

[22] The exact number of applications distributed and applicants interviewed is not completely clear on this record. It appears, for example, that some parents returned applications for applicants and it is not clear whether Gremonprez questioned any parents about the applicants qualifications. I find it unnecessary to determine the exact number of applications distributed or applicants interviewed in order to dispose of the issues herein.

> Donald does the JDMA site in 1-1/2 to 2 days by himself, where in it takes 2 individuals 2 full days to accomplish the very same task. This is inclusive of mowing, trimming, weed eating, spraying, fertilizing, etc. He's a perfectionist whose work is immaculate or he is not satisfied.

Florida Annex's supervisor for Johnson Control World Services, Inc. R. W. Bell's letter of reference for Brands reads:

> Donald has the responsibility of overseeing and maintaining the grounds for the Florida Annexes. Donald has performed his duties in a most proficient, professional manner and is an asset to any organization.

Another letter of reference regarding Brands' grounds keeping duties at the Cape reads:

> Don has consistently gone beyond the call of duty to get the job done. He is highly motivated, intelligent, and experienced . . . .

On his employment application Walter Brooken listed a year (1994 to 1995) of grounds maintenance 220–D tractor operator experience at the Cape.

William Chapman listed 5 years of grounds maintenance experience at the Cape with tractor operator experience on a Ford tractor equipped with ''bat wing'' mowers, as well as experience on the 580–D tractors. Chapman also noted he had a Air Force secret security clearance with escort capabilities that allowed him to escort other employees, ''into all major areas of the Cape.''

Tim Claiborne listed 7 years of grounds maintenance experience on his application with the most recent 4 years being at the Cape for the predecessor employer, U.S. Contracting, where he served in various capacities from a grounds maintenance crew member to the ''leadman'' of a 1–6 person team. Claiborne listed a ''secret'' security clearance with authorization to escort fellow employees into various restricted areas at the Cape. Claiborne provided two letters of reference, one of which was prepared by Robert P. Chapman. In his letter Chapman noted he had observed Claiborne since 1993 and,

> [d]uring that time he [Claiborne] had been the crew leader of the grounds crew maintaining CX–17 at Cape Canaveral Air Force Station. In my capacity as Superintendent of Facilities I have observed both the results of his work and the way he handles his crew and his customer. His performance in all these areas has been outstanding.

Chapman, ''highly'' recommended that Claiborne be employed.

On his application for employment Derrick Fowler listed approximately 8 years of grounds maintenance experience with the most recent 4 years being at the Cape for U.S. Contracting. Fowler's application reflects he operated a 580–D tractor and was familiar with diagnostic problems related to that particular piece of equipment. Fowler also noted he had mowed the grass on and maintained ''ordinance mounds'' at the Cape with the Ford 1520 and 1320 tractors. Prior to working for U.S. Contracting Fowler maintained the grounds at La Cita Country Club, Titusville, Florida. Fowler provided a letter of reference from Project Supervisor Arthur Huelke which reads in part:

> In regards to Derrick Fowler and his employment with U.S. Contracting . . . that started on 10/22/90 . . . [h]e has shown us that he can learn to operate any piece of equipment we have . . . 220–D Toro Riders, 322–D Toro Riders, 1520 Tractor Ford and many other pieces of equipment. . . . The machinery which the Company uses his ability on is the 580–D, 15' finish cut. . . . This piece of equipment is a $50,000 unit and is only operated by two people, one of them is Derrick.
>
> You would be very wise to let this type of employee become a part of your work force. . . .

Craig Graham listed grounds maintenance services experience with U.S. Contracting, as well as among other duties, his grass cutting experience with a former employer from 1989 to 1992.

James Guy Jr. listed approximately 2 years' work experience as a ''crew leader'' for U.S. Contracting at the Cape where he indicated his job duties included ''mak[ing] sure that all job sites'' were completed.

Melvin Haynes listed approximately 18 months of grounds maintenance services experience with U.S. Contracting where he performed weeding and lawn maintenance including operating riding mowers, weed eaters, and edging equipment.

On his application for employment Kenneth Kellum listed 3 years' grounds maintenance services experience with U.S. Contracting as a machine operator.

Frank Major listed approximately 4 years' grounds maintenance services experience with U.S. Contracting including operating the 580–D tractor. Major also listed 4 years of grounds maintenance services at La Cita Country Club, Titusville, Florida, where, among other grounds keeping services, he worked as a tractor operator.

John Monseur listed approximately 4 years' grounds maintenance services experience with U.S. Contracting at the Cape where he operated the Ford 6610 tractor with 15' ''bat wing'' mowing decks.

Thurman Purdiman listed approximately 18 months of grounds maintenance services at U.S. Contracting. Floyd Rachels listed approximately 4 years grounds maintenance service experience including experience as a Ford 6610 ''bat wing'' tractor operator covering the ''entire Cape area.'' Rachels indicated he has an ''indefinite'' security clearance for all areas at the Cape. Rachels provided a letter of reference from U.S. Contracting Project Manager Gopel (who also became the assistant project manager for the Company herein) which reads in part that Rachels ''diligently worked his way up the ranks to become a heavy tractor operator, which requires, skill, good judgment, and the ability to follow instructions to the letter.'' Gopel's letter continued:

> This 3,000 plus acre project required constant input from my operators to meet Air Force standards. Mr. Rachels provided that coupled with his honesty, dependability and punctuality made it a pleasure to have him as a valued team member.
>
> It would be my pleasure to work with or for Mr. Rachels in the future.

On his application for employment with the Company Charles Reed listed approximately 18 months of grounds maintenance services experience operating ''any and all equipment.''

Joel Reed listed 4 years' grounds maintenance services experience with U.S. Contracting, noting he had worked as a 6610 tractor operator. Reed also listed approximately 6 years of grounds maintenance services with David Kemerer Grasscutters providing lawn care services.

Edwin Robles listed approximately 4-1/2 years' grounds maintenance services experience with U.S. Contracting.

Kevin Rochen listed 2 years' grounds maintenance services experience and indicated he had operated various types of groundskeeping equipment.

Samuel E. Smith listed 4 plus years of tractor operator experience with U.S. Contracting and 1 year of like experience with Laidlaw Tree Service mowing grass along Interstate 95 in Florida. Smith also provided letters of reference. For example, Florida Annexes Supervisor for Johnson Controls World Services Inc., R. W. Bell wrote in part:

> Sam Smith, who is presently employed by U.S. Contractors . . . has the responsibility of overseeing and maintaining the grounds for the Florida Annexes. Sam has performed his duties in a most proficient, professional manner and is an asset to any organization.

Air Force Facilities Manager Phillips Laboratory Malabar Site, George Nemetz wrote about Smith, ''You have consistently demonstrated versatility and dedication'' and Nemetz extended his ''satisfaction on your contribution to the dedicated service you have offered to the Malabar Facilities.''

E. *Those Hired by the Company*

The Company hired approximately 26[23] employees for the startup of services on March 1. For its initial crew the Company hired two U.S. Contracting employees, namely, Ted Richenbach and U.S. Contracting Project Manager Kirt Gobel. Gobel assumed the duties of Assistant Project Manager for the Company here. The Company offered five then current (February 28) D. M. Potts Corporation employees the opportunity to permanently transfer to the Company here. The five accepted the offer and commenced working for the Company on March 1. The five were laborers Sean Williamson, Rebecca Turner (O'Brien), Riley Massey, and Roger Brown along with Tractor Operator Brent Swanson. Charlie Brooks was hired as a tractor operator by the Company on March 1. Brooks had, for an extended time, until July 19, 1994,[24] worked for D. M. Potts Corporation.

The Company hired three additional tractor operators effective March 1, namely, Kenneth Willoughby, Donald Humphrys, and Richard Lundquist.

Willoughby listed operating experience on ''all lawn equipment'' and supervisory experience on ''all facets of lawn business'' for Florida Lawn Specialist from January to March. Willoughby listed 6 months of experience in 1994 assisting in the construction and maintenance of a 123-acre 18-hole golf course in Southport, North Carolina, where he supervised a crew of 10 involved in pesticide and fertilized application. Willoughby listed experience from August 93 to June 94 with the Great Outdoors training and supervising 10 employees in a large sod and drainage project and indicated that from April 92 to August 93, he was involved in the maintenance and operation of an 18-hole golf course in New Smyrna, Florida. From October 1988 to April 1992 Willoughby performed all facets of maintenance and machine operations for The Great Outdoors.

Humpreys listed experience in fruit grove mowing from April to August 1992.

Lundquist listed no grounds maintenance equipment experience on his employment application; however, he indicated he was familiar with landscaping and lawn equipment such as mowers, tractors, and edgers.

The Company hired Jeffrey Russell, Harold Milton, Deborah (Robinson) Gregory, Michael Brooks, Jason Minteer, Robert Martinolich, Chris Senft, Ronald Culleny, and Nick Hatfield as laborers for the start of operations on March 1.

Russell listed experience operating lawn mowers, tractors, front-end loaders, and dump trucks from September 1978 to February 1981 for the town of Melbourne Beach, Florida.

Milton listed grounds maintenance experience including mowing, weed eating, edging, and trimming trees for Americana Resort, Rockledge, Florida from May 1990 to July 1991. Milton listed commercial and residential lawn care experience for Tropical Lawn & Maintenance, Melbourne Beach, Florida, from September 1989 to April 1990. Milton listed all phases of apartment and grounds maintenance for Richton Square Management Company, Richton Park, Illinois, from December 1987 to August 1989. From May 1989 to December 1989 Milton work for Brent Vanbever Lawns, Melbourne, Florida, doing all phases of commercial and residential lawn services.

Gregory listed work experience at Crestview Villa's from October 1985 to May 1986, caring for grounds, picking up trash, mowing, weed eating, cleaning, and trimming palm trees. Gregory indicated she worked for Good Earth Enterprises from May 1986 to February 1995 where her ''duties were to go to jobs, mow, weed eat, clean, pick up trash, weeds, trim shrubs and trees every week as needed.''

Brooks listed work experience with Bill Strong Enterprises ''transplanting palm trees, grading and sod'' work from November 1993 to December 1994 and mowing experience at Turtle Creek Gulf Club utilizing various kinds of mowers between September 1991 and May 1993. Brooks also listed experience in ''removing trees and transporting to Melbourne Dump'' for Atlantic Tree Service from April to August 1991.

Minteer listed work experience at Wright Patterson Air Base ''summer job only,'' cutting grass, weed eating, and trimming along softball fields from June 1990 to October 1991.

Minteer also listed 16 hours a week part-time lawn care for a private individual from May to August 1994. Martinolich indicated on his application that he owned and operated a lawn maintenance service from August 1988 to April 1992 and managed Ron Martinolich Landscape Inc. from August 1993 to August 1994.

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[23] It appears the 27th employee was Robert Birnie, an employee of D. M. Potts Corporation who worked as a mechanic for the Company for 30 days with the understanding he would, as he did, return to his employment with D. M. Potts Corporation at the end of his 30-days with the Company.

[24] Brooks was terminated by D. M. Potts Corporation on that day because Brooks intended to compete against D. M. Potts Corporation for grounds maintenance services contracts with the Air Force.

Chris Senft listed weed eating, edging, and cutting experience with Wright Brother's Lawn Maintenance from April 1992 until May 1994.

Ronald Culleny listed tractor mowing, weed whacking, and tree trimming experience with Lloyds Lawn Care from some point in 1989 until 1995.

Nick Hatfield listed trimmer and grounds maintenance experience at Davey Tree Company; however, he did not reflect a date for his experience.[25]

The Company hired seven full-time temporary laborers effective March 1, namely, Judson Cason, John Lowe, Keith Davis, Christopher Driggers, Shane Sainz, Walstien Daughtry, and Kevin Gallant. Cason, Lowe, Davis, and Driggers did not list any grounds maintenance services experience on their applications.

Sainz indicated he owned and operated Potters Lawn Service, Melbourne, Florida, from January 1993 to February 1995.

Daughtry listed experience with the United States Army Military Police in Germany from September 1987 to September 1992 where his major duties were performing mowing and edging details, watering, raking, and providing grounds labor.

Gallant listed 7-1/2 years of landscape experience but failed to provide the dates he acquired such experience.

II. THE INDEPENDENT ALLEGATIONS OF UNLAWFUL CONDUCT

I shall next address the independent allegations of unlawful conduct attributed to various supervisors and agents of the Company.

A. *Monsuer's Interview*

U.S. Contracting tractor operator Monseur testified he learned the Company would be conducting job interviews as a result of the Company's newspaper advertisement. Monseur testified he was the first applicant interviewed by Project Manager Gremonprez on February 14. Monseur said he handed his completed application to Gremonprez, while they were alone in his office, Gremonprez ''looked up at me and said, you all are union out there, aren't you.'' Monseur responded, ''Yes, sir, the union went into effect October of 1992.'' After a few other comments Gremonprez told Monseur the Company would be conducting further interviews on February 21 and 22.

Project Manager Gremonprez denied asking applicants questions regarding their union status, affiliation, or sympathies. Gremonprez explained that when the word union or references to union sympathies appeared in his contemporaneous interview notes it was as a result of the applicant bringing the Union up during the interview.

The Company argues it had no need to question applicants of U.S. Contracting about the Union, because it knew its predecessor was unionized.

On the basis of his demeanor and the full record, I am convinced, Project Manager Gremonprez was not fully candid when he testified about interviewing applicants for employment. Monseur, on the other hand, impressed me as attempting to testify truthfully. Although I am mindful of his interest in the outcome of these proceedings, I nonetheless found Monseur to be a believable witness. Accordingly, I credit him.

In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub. nom. *Hotel Employees & Restaurant Employees Union v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Rossmore House*, the Board held the lawfulness of questioning by employer agents about union sympathies and activities turns on the question of whether ''under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.'' The Board in *Rossmore House* noted the *Bourne*[26] test was helpful in making such an analysis. The *Bourne* test factors are as follows:

> 1. The background, i.e. is there a history of employer hostility and discrimination?
> 2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
> 3. The identity of the questioner, i.e. how high was he in the Company hierarchy?
> 4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of ''unnatural formality''?
> 5. Truthfulness of the reply.[27]

I find, as alleged in the complaint, that Project Manager Gremonprez' questioning Monseur about the Union violated Section 8(a)(1) of the Act. In *Active Transportation*, 296 NLRB 431 (1989), the Board found that questions of applicants about their union sympathies violates the Act even though the interviewer knew from the applicants' job applications they had previously worked at a unionized employer. The Board at footnote 3 in *Active Transportation* observed:

> First we note the interrogation occurred during [the applicant's] job interview. The Board has long recognized that, under the totality of the circumstances test, an applicant may understandably fear that any answer he might give to questions about union sentiments posed in a job interview may well affect his job prospects.

B. *Fowler's Interview*

U.S. Contracting tractor operator, union steward, and job applicant Derrick Fowler testified that when he was interviewed by Project Manager Gremonprez on February 15, Gremonprez read his resume and:

> At some point he stopped. He said, who's the shop steward up there. I said, I am. He said, well, I don't see anything here on your resume, what, you're not very proud of that.
>
> I said, I didn't think it was a job requirement. He said, you're right. It's not going to be on this job.
>
> After that, he was still looking at my resume. He said, well, how did you get roped into that job any-

[25] Other records of his experience would indicate that it was sometime prior to 1989.

[26] *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964)

[27] The *Bourne* test has been cited with approval by various Circuits. For a partial listing of those circuits see *Teamsters Local 633 v. NLRB*, 509 F.2d 490 fn. 15 (D.C. Cir. 1974).

ways. I said, well, I guess they wanted somebody with a level head to represent them.

Project Manager Gremonprez' interview notes regarding Fowler reflect ''U.S. Contracting 580–D Operator, shop steward,[28] young man, clean cut, would not use bad ATTITUDE.'' Gremonprez denied asking applicants about the Union.

I credit Fowler's account of his interview with Gremonprez. Fowler did not include his job steward position on his application; therefore, I find unlikely he would have volunteered that fact to Project Manager Gremonprez during the interview.

Did Gremonprez' comments violate the Act? Yes, for a number of reasons. First Fowler was a known union supporter (steward) at U.S. Contracting, but as the Government contends he was not an open union adherent in the context of his job interview seeking employment with the Company herein. No valid reason exists for such an inquiry during a job interview. Furthermore, Gremonprez' telling Fowler that even though the predecessor employer had a union and union steward, ''this job'' for which he was interviewing was not going to have a steward. While statements that an employer is, or has, a nonunion work force may sometimes be merely descriptive and lawful, in the instant context, Gremonprez' comments had a reasonably foreseeable coercive impact. The Company knew the predecessor employees' were unionized and by Gremonprez saying it was not going to be a job requirement on their project he was conveying the message that regardless of the circumstances his Company would not deal with the Union. Furthermore, Gremonprez' comments implicitly invited a response from Fowler concerning whether he had any objections to such working conditions. The Board has recognized that statements of this nature made during employment interviews constitute coercive interrogation even in the absence of threats. See, e.g., *Royal Midtown Crysler Plymouth*, 296 NLRB 1039 at fn. 4 (1989). Accordingly, I find Gremonprez' comments constituted unlawful interrogation as alleged in the complaint.

C. *Clairborne's Interview*

U.S. Contracting Crew Leader and job applicant Tim Claiborne testified he was interviewed on February 15 by Project Manager Gremonprez. Claiborne testified:

> Well, I was waiting my turn to come in after the last interview behind the door. And when I knew that person was gone, I came out and I handed my resumes—resume, application, and, I think, two letters of—letters of recommendation.
>
> He was jotting stuff down. He said he'd be with me in a second. He looked over my application and my letters of recommendation. And he asked me what I did at the Cape. And I told him that I was a crew leader and I took care of semi-improved areas. And I included—I specified and said I did 40 and 41, Complex 40 and 41 out there.
>
> He asked me if I was still employed out there. And I said yes. Then he made the statement, well, there's a lot of people out there fixing to lose their jobs, aren't there. And I said, yes, I guess so.
>
> He told me they were going to be running the advertisement again and taking applications the 21st and 22nd and they would go from there. And that was pretty much the end of the interview.

Gremonprez' interview notes regarding Claiborne state: ''U.S. Contracting employee NOT BAD, but not good either. Crew Leader out areas. Probably would not use.''

Gremonprez did not specifically deny Claiborne's account of the interview. I credit Claiborne.

I am persuaded that, taken in the context of an employment interview, Gremonprez' statements made it clear to Claiborne the Company would not be hiring the U.S. Contracting employees. Gremonprez told Claiborne, a lot of people out there, where Claiborne indicated he was still working, would be losing their jobs. I note Claiborne and those working for U.S. Contracting were the only ones in this setting with jobs to lose. The implicit, albeit unstated, reason for the threat was the union affiliation of the predecessor employees. I find, as alleged in the complaint, that this constitutes an unlawful threat of reprisals against employee applicants because of their union affiliation.

D. *Gremonprez and Potts Statements*

Former Company employee Judson Cason testified that Project Manager Gremonprez spoke with he and other full-time temporary laborers after they were hired in March. Cason testified, ''a couple'' of them had long hair and ''a few'' of the ''male'' employees had ear rings. According to Cason, Gremonprez wanted the ones with long hair to have it cut and those with ear rings not to wear them at work.

Cason testified that during the first week he was employed at the Company Project Manager Gremonprez told all the employees assembled at the Grounds Maintenance Building at the Cape, ''not to associate or talk with anyone with the Union'' ''not to talk with anyone about the Union or discuss anything with anybody about the Union.'' Cason further explained Gremonprez, ''stated that if we . . . employees had heard any comments about the Union, to come forth and let him know and try to find out the individual's name and badge number to give it to him.''[29]

Cason testified Consultant Potts came to the grounds maintenance shop at the Cape around May and ''had some information about some of the rumors that we were hearing about the Union suing them.'' According to Cason, Potts handed out copies of a lawsuit[30] and Project Manager Gremonprez stated, ''the Union wouldn't be able to do any-

[28] As noted elsewhere in this decision, Gremonprez explained that anytime there was reference to the Union in his interview notes it was because the applicant had brought up the subject.

[29] Cason stated on cross-examination that Gremonprez told them to report any contacts about the Union ''either during work hours or on our own time.'' Cason acknowledged on cross-examination he was aware that an employee name Debbie had reported she had been approached by the Union during a time when she was suppose to be working and it was at about this time that Project Manager Gremonprez met with the employees.

[30] The document Cason, without contradiction, testified he received from Potts was the second amended charge in the instant case which is dated May 26, and bears a fax transmission date imprinted thereon of May 30.

thing for us, they wouldn't get—save our jobs or get us any more money, and that they were just trying to save their members' jobs.'' Cason said a majority of the employees asked questions about the lawsuit including whether or not it could have been avoided if the Company had just hired a few of the predecessor employees. Cason said questions were also asked about the length of the Company's contract and that Consultant Potts told them it was just for one year and then would be up for rebidding. Cason said someone asked if the Union was successful in its law suit and the Company had to hire the predecessor employees what positions would they get. According to Cason, Potts stated some of the predecessor employees were operators and they would be after their original positions, others were crew leaders and they would be after their original positions and added that some of the employees he had hired would have to leave the Company to make room for the predecessor employees to come in. Cason testified Potts said he did not want to hire the union people ''because they were Union.''

Project Manager Gremonprez testified that soon after March 1 (some time in the first or second week of March) it was brought to his attention by employee Debora Robinson that while she was working near the R & D hanger at the Cape she was approached by a man who wanted to talk about the Union.[31] Gremonprez testified he contacted an Air Force Contracting Officer who told him the Air Force would handle it. Gremonprez testified Air Force Labor Relations Advisor Pernas-Giz thereafter telephoned him and ''advised'' him of an Air Force regulation that it was ''unlawful . . . for our people to be contacted during working hours, and that in the future if it happened we were to get a badge number, a license plate on the truck, a name, and go through the channels like I had before.''

Air Force Labor Relations Advisor Pernas-Giz testified he was advised by an Air Force Contracting Officer that Gremonprez had complained about an incident where the Union had approached one of the Company's employees while at work and offered information on union activities and how to organize if the new employees wanted to do so. Pernas-Giz said he became concerned because he had not received a request from anyone to conduct organizing activities at the Cape. Pernas-Giz said he contacted Project Manager Gremonprez and told him that without a name, badge number, or vehicle number to help identify the person who supposedly was attempting to organize there was little the Air Force could do. Pernas-Giz said he may have explained[32] Air Force policy on union activities to Gremonprez. Pernas-Giz testified:

> I would have told him that with no name and no information that would pinpoint who this person was, there was really no action we could take, and that if such incident was to take place in the future, that it was important to get a name, a badge number, a vehicle number or anything that would give us the ability to tract who that person was.
>
> I would have told him basically, that in order for the—any Union to conduct an organizing activity on Air Force premises they would have to first write and ask for permission and, obviously, be granted that permission.
>
> Number two, that their president—their presence on the Air Force installation could not create a safety or any type of a commotion, problem, that the organizing would have to be restricted to a neutral area where it's obviously not the employer's work area, and it could not be conducted during employee working hours.

Project Manager Gremonprez testified:

> After I talked to Jesus, [Pernas-Giz] in a morning meeting, I told those people—I told my people out there that in the future that if they were contacted during working hours by somebody from the Union wanting to talk about the Union, then I needed more concrete confirmation of who they were, whether it be a badge number, whether it be a name, whether it be a truck, a license number, so that we could pin it down, and then I would go through channels with it.
>
> [By Company Attorney Mr. Rock:] Did you tell the employees or explain to them what you meant when you said, ''working hours?''
>
> [Answer by Gremonprez] No, sir. I told them what they did on their own time is their business. But, I didn't be specific about working hours.
>
> In other words, I didn't go into their breaks and their lunch specifically.

Project Manager Gremonprez denied telling employees they could not talk with anyone about the Union or that the Company refused to hire U.S. Contracting employees because they were union members.[33]

Cason impressed me as an unreservedly honest witness and, as such, I credit his testimony. According, I find, as Cason testified, that Project Manager Gremonprez instructed employees in March not to associate with or talk with anyone with the Union.[34] I find Gremonprez' instructions for employees not to associate with or talk with anyone that was with the Union to violate Section 8(a)(1) of the Act as alleged in the complaint. In so concluding I note that at the time Project Manager Gremonprez instructed employees not to associate with or talk with anyone associated with the Union he also directed employees to report the identity of anyone approaching them about the Union. In that regard Project Manager Gremonprez testified, ''I told my [employees] . . . that in the future that if they were contacted *during working hours* [emphasis added] by somebody from the

[31] Rebecca O'Brien corroborated Gremonprez' testimony to the extent of knowing that an employee had complained about being approached by someone about the Union.

[32] Pernas-Giz was not 100-percent sure, but, said it made sense that he would have explained Air Force policy to Gremonprez.

[33] Employees Walstien Daughtry, Jeffrey M. Russell, and Donald B. Humphrys testified that Project Manager Gremonprez did not tell employees they could not talk about the Union nor tell them the Company had refused to hire applicants from U.S. Contracting because they were Union.

[34] I am not unmindful of certain employee witnesses, namely, Daughtry's, Russell's, and Humphrys' testimony to the contrary; however, they impressed me as witnesses overly anxious to state facts most favorable to the Company and their personal employment interests rather than to recall with accuracy Gremonprez' comments.

Union wanting to talk about the Union, then I needed more concrete confirmation of who they were.'' While Gremonprez stated, ''I told them what they did on their own time is their business'' he nevertheless added he wasn't ''specific about working hours . . . I didn't go into their breaks and their lunch [times] specifically.'' I find Gremonprez limited reporting contacts with employees to ones made by or about the Union and that his instructions covered ''working hours.'' Simply stated Gremonprez' instructions on reporting contacts were aimed strictly at conversations, associations, or contacts with or about the Union as opposed to other forms of association contacts or conversations. Further Gremonprez, in his orally promulgated rule, failed to *clearly* differentiate between whether employees associating with, talking to, or making contacts with union personnel were doing so on nonworking times or in nonwork or nonrestricted areas. Such restrictions on employee activities are presumptively invalid and unlawful. See, e.g., *Our Way, Inc*., 268 NLRB 394 (1983). Simply stated the Company's no-talking and reporting rule, as announced by Gremonprez, is overly broad and discriminatorily aimed solely at union activities and as such violates Section 8(a)(1) of the Act, and I so find. I reject the Company's contention it was merely enforcing Air Force labor policy on solicitations and contacts. Whatever the Air Force's policy is, and I need not decide, the policy announced by Project Manager Gremonprez in March violated the Act.

Consultant Potts testified he spoke to all employees in the presence of Project Manager Gremonprez and Assistant Project Manager Gopel at the Cape about the Union on a Monday morning in July. Potts said he brought along ''copies of this complaint'' which he identified as the second amended charge filed by the Union in the instant case. Potts said, ''I told them that the . . . ex-employees and the Union have filed the unfair labor practice charge . . . [a]nd that the employees . . . the remedies that they were seeking were to be hired back and back wages'' Potts further testified:

> I told them that a complaint had been filed. I may have read portions of the complaint. And that a 10–J injunction was requested, and that possibly a hearing could have been conducted within the next 30 days.
>
> I told them that I would let them know when the hearing—if, in fact, the hearing had been scheduled and I would keep them updated as to what would transpire at that hearing if it would have occurred.
>
> And told them that they had—You know, I just left it up to their questions if they had any questions concerning the charges.

Consultant Potts denied telling the employees they could not join the Union or telling the employees not to join the Union. Consultant Potts also said he did not direct employees to report conversations they had with anyone about the Union because Project Manager Gremonprez ''had covered that.''

With regard to credibility I note the following: On direct examination Company employee Keith Davis testified that when Consultant Potts spoke with the employees he did not tell them the Company did not hire U.S. Contracting employees because they were Union. On cross-examination Davis could not recall Potts speaking with the employees about the charge or complaint the Union had filed against the Company. Davis' recollection was that Project Manager Gremonprez read through the charge. Company employee Walstien Daughtry first testified Consultant Potts and Project Manager Gremonprez spoke to the employees in either June or July but then stated, ''[i]t was in the earlier part of the contract.'' Daughtry said Potts read from General Counsel Exhibit 24 (the second amended charge) and distributed copies to the employees. Daughtry stated Consultant Potts did not say the Company had refused to hire U.S. Contracting applicants because they were union members. Company employee Donald Humphrys testified he was present at the meeting when Consultant Potts spoke about and distributed copies of the second amended charge that had been filed by the Union against the Company. Humphrys was not asked and did not testify in detail about the meeting but did state Consultant Potts did not say the Company had refused to hire applicants from U.S. Contracting because they were members of or supported the Union. On cross-examination Humphrys said Project Manager Gremonprez told the employees the Company was a nonunion Company but he was not certain which employee meeting Gremonprez made those comments at. Company employee Jeffrey Russell testified that in late May or early June, Consultant Potts met with and told the employees that complaints had been made against the Company by the Union and gave the employees copies of the complaint.

I credit Cason's testimony that Consultant Potts told the employees in late May or early June that he did not want to hire the union people, because they were Union. I credit Cason's testimony for a number of reasons. First Potts did not deny making such a statement. Potts acknowledged discussing the charge and perhaps reading portions of it to the employees and acknowledged the meeting turned into a question-and-answer session. Potts did not give details about the questions asked or answers provided. Potts did acknowledge on cross-examination that he told the employees that they might lose their jobs if the Union was successful in its efforts to require the Company to hire the predecessor employees. I am unwilling to place reliance on Company employee Davis' testimony that Potts did not make the statement in question, because Davis recalled Gremonprez being the one explaining or reading through the charge rather than Consultant Potts. Neither do I place reliance on Company employees Daughtry's and Humphrys' denying Potts made such a statement. I note that neither Project Manager Gremonprez nor Assistant Project Manager Gopel, whom Potts stated were present, denied Potts made the statement attributed to him by Cason. In summary, and for the reasons noted, I credit Cason's testimony as outlined above. I am persuaded the meeting was in late May or early June because not only did Cason place that as the time but Company employee Daughtry also placed the meeting early in the contract. It is acknowledged that Consultant Potts handed out the second amended charge at the meeting which charge was filed on May 26 and had a fax date of May 30 imprinted on it at the time it was handed out. I note that by the beginning of July the charge had been amended a third and fourth time and served on the Company. I am persuaded that if the meeting had been in July the latest dated amended charge would have been distributed by Potts. I am persuaded, as alleged in the complaint, that the Company acting through Consultant

Potts violated Section 8(a)(1) of the Act when he told employees in late May or early June he did not want to hire the union people, because they were union.

Former Company employee Rebecca Turner O'Brien[35] testified she was employed by D. M. Potts Corporation from March 1, 1992, until February 28, 1995, at which time she transferred (effective March 1) to the Company herein. O'Brien testified that in February, during the time Project Manager Gremonprez was hiring employees for the Cape, he asked her while they were alone if she would like to transfer from D. M. Potts Corporation at Patrick Air Force Base to the Cape, that it would be more money for her. O'Brien told Gremonprez she would and ''I asked him how many of the old people [U.S. Contracting employees] at Cape Canaveral Air Station would be remaining and he said none of them.''

O'Brien testified she transferred to the Company at the Cape on March 1 and worked until she quit her employment on May 19. O'Brien testified that sometime during her employment at the Company she attended at an employee meeting at which Consultant Potts spoke.[36] O'Brien testified:

> Mr. Potts informed us that we were having problems with the Union and that if we did go Union, that he would not carry the contract any longer.

O'Brien could not recall if it was at this same meeting or another occasion when Project Manager Gremonprez asked the employees, ''why did we need the Union because we already had our jobs. And why should we pay for a job that we already had.''

O'Brien stated on cross-examination that Consultant Potts also told the employees the Union had filed unfair labor practice charges against the Company and that the Government might seek injunctive relief.

Consultant Potts denied ever having a discussion with O'Brien at the Cape regarding the Union. Potts further denied telling O'Brien that if the employees went union he would pull the contract or walk away from the contract.

O'Brien testified in a calm, relaxed, articulate, and comprehensive manner. No valid reason was advanced to suggest she had any motive to misstate the truth. I note she apparently was a good employee of D. M. Potts Corporation who was offered and accepted an opportunity to transfer to the Company with better pay. I am not unmindful that she left her employment with the Company; however, the circumstances of her leaving are not detailed on this record. In crediting O'Brien's testimony I am fully aware of a number of factors. For example the meeting about which she testified regarding Consultant Potts' speaking to the employees could not have been a later employee meeting at which Potts and Gremonprez spoke to the employees (that is set forth in detail elsewhere in this decision) because that other meeting took place on or after May 30, as reflected on the second amended charge Potts distributed at that later meeting. O'Brien was no longer working for the Company on or after May 30, and would not have been present at any such employee meeting. Thus in crediting O'Brien I must conclude, as I do, that Consultant Potts spoke to the employees herein about the Union on at least two occasions.

To tell employees, as I find Consultant Potts did, that if the employees went union the Company would walk away from its contract with the Air Force constitutes an unlawful threat in violation of Section 8(a)(1) of the Act, and I so find. See, e.g., *Wiljef Transportation*, 299 NLRB 710 at fn. 1 (1990).

E. *Certain Interview Notes of Gremonprez*

The Government and Union contend that in addition to noting which applicants worked for the unionized predecessor employer, U.S. Contracting, Project Manager Gremonprez' contemporaneously written applicant interview notes also reveal the Company's sentiments regarding unionization. For example, Gremonprez wrote regarding applicant number 120 ''last eleven yrs. at Cape, asked about Union, probably not a good prospect.'' Gremonprez' notes about applicant number 200 reflect, ''Lots of experience, all Union, some what of a bad attitude.'' Gremonprez' notes regarding applicant number 102 reads, ''U.S. Contracting, 580–D operator, shop steward, young man, clean cut, would not use bad ATTITUDE.'' Gremonprez noted regarding applicant number 154, ''U.S. Contracting . . . employee, nice kid, did not join the Union.'' Project Manager Gremonprez wrote regarding applicant number 10, ''Good appearance, not much experience, owned his own business, clean cut, worked as a SCAB, on strike by EGG employees, may use.''

III. ANALYSIS DISCUSSION AND CONCLUSIONS

Did the Company refuse to consider for employment and refuse to hire the employee applicants of the predecessor employer listed in the complaint, because the employees were affiliated with the Union and in order to discourage employees from engaging in such activities and to avoid a bargaining obligation with the Union? Before going into the specifics of answering the above, it is helpful to review certain legal principles.

A. *Legal Principles*

It is well established that a failure to hire a job applicant because of his/her union sympathies or activities violates Section 8(a)(1) and (3) of the Act. The same principle applies when an employer, for the same reason, fails to consider an applicant for employment. See, e.g., *D.S.E. Concrete Forms*, 303 NLRB 890, 896 (1991), and *Vos Electric*, 309 NLRB 745, 759 (1992). A newly selected successful contract bidder (such as the Company here) is not obligated to hire its predecessor's employees, but may not refuse to hire the predecessor workers solely because they were represented by a union or to avoid having to recognize a union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). As was noted by Judge Steven Davis, in his analysis in *Laro Maintenance Corp*., 312 NLRB 155, 161 (1993), an employer is only required to consider and select its predecessor's employees on the same lawful basis utilized with respect to others it considered and either selected or rejected. In other words were all applicants for employment judged by the same standards, with the failure to hire the alleged discriminatees reflecting no more than an equal application of those standards. The Board in *U.S. Marine Corp*., 293 NLRB 669, 670 (1989), listed a number of factors that tend

[35] Rebecca Turner and Rebecca O'Brien are the same person.

[36] O'Brien stated Project Manager Gremonprez was also present.

to establish whether a new employer has violated the Act in refusing to hire employees of the predecessor. It is noted in *U.S. Marine Corp*.:

> The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: Substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or other acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approve in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. An employer cannot simply present a legitimate reason for its actions but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

The classic elements commonly required to make out a prima facie case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus. As to the latter element, the Board, under certain circumstances, will infer animus in the absence of direct evidence. Such a finding may be inferred from the record as a whole. See, e.g., *Fluor Daniel, Inc*., 304 NLRB 970, 971 (1991). In the *Fluor Daniel, Inc*. case, which involved refusals to hire, the Board concluded that where all applicants who revealed some indication of union membership on their applications were not contacted or called in for an interview or hired while applicants who uniformly displayed weak or nonexistent union ties were, it was reasonable to infer it was not just coincidental and that such disparity, standing alone, was sufficient to support a prima facie case of discrimination.

In *AMI, Inc*., 319 NLRB 536 (1995), the Board relied, in great part, on the following factors to establish a prima facie case: statements by the employer's representatives that employees of the predecessor were being denied job applications, because they had worked for the predecessor employer, and the consistent refusal by the employer's officials to speak with union officials despite the union's repeated attempts. Furthermore, in *AMI, Inc*., the Board placed reliance on the fact the employer failed to show that any of the predecessor employees were not hired for lawful reasons. In fact in *AMI, Inc*., the Board concluded that the evidence established the employer had predetermined not to hire any of the predecessor employees and ''carried out its plan to near perfection.'' The Board in *AMI, Inc*. noted that the employer's refusal to hire the predecessor's employees was part of its plan to avoid an obligation to recognize and bargain with the Union and thereby violated the Act.

B. *The Prima Facie Case*

Based on the facts herein I find the Government established its initial burden under *Wright Line* of demonstrating that the union membership of U.S. Contracting employees was a motivating factor in the Company's failure to employ them.

It is undisputed that the Company, and more particularly Company Vice President Johnson, Consultant Potts, Project Manager Gremonprez, and Assistant Project Manager Gopel all knew of the unionized status of the predecessor employees. The status of U.S. Contracting as a unionized employer was, for example, revealed to the Company in the bid package the Air Force provided to all potential bidders including the Company here. Assistant Project Manager Gopel served in a supervisory position for the unionized predecessor employer U.S. Contracting.

The Government's evidence of the Company's antiunion animus and its unlawfully motivated hiring practices follows. First, even though the Company was aware of the unionized status of the predecessor employees, Project Manager Gremonprez, for no valid reason, unlawfully asked the first U.S. Contracting applicant he interviewed on February 14, if (U.S. Contracting) was unionized. Second, Project Manager Gremonprez asked U.S. Contracting shop steward and applicant, Derrick Fowler, during his interview, about his job steward status at the predecessor employer and, after ridiculing Fowler about his job steward position, informed Fowler such would not be a job requirement with the Company here. Gremonprez in his contemporaneously prepared interview notes on Fowler noted he was a ''clean cut'' ''young'' tractor operator, but he would not use Fowler noting Fowler was a ''shop steward'' and had a ''bad attitude.'' Third, Project Manager Gremonprez impliedly threatened U.S. Contracting employee and job applicant Tim Claiborne during his interview when Gremonprez told Claiborne on February 15, that ''a lot of people out there fixing to lose their jobs, aren't there.'' It is noted that Gremonprez told Claiborne this well before the second series of interviews had been conducted, thus leaving the clear indication that the unionized U.S. Contracting employee applicants were not going to be considered for and more importantly, left out of the hiring process by the Company. Furthermore, Project Manager Gremonprez told D. M. Potts Corporation employee Rebecca O'Brien, when she was asked about transferring from D. M. Potts Corporation to the Company herein, that none of the U.S. Contracting employees would be remaining at the Cape with the Company here. Fourth, Project Manager Gremonprez noted in his contemporaneously prepared interview notes that each of the U.S. Contracting employee applicants had in fact been employed by the unionized predecessor employer but he did not note the prior employers of other non U.S. Contracting applicants. Fifth, Project Manager Gremonprez' interest in the union sympathies of applicants is set forth in certain of his interview notes: on applicant number 10, ''good appearance, not much experience . . . worked as a SCAB on strike . . . may use him''; applicant number 200, ''lots of experience, all union, somewhat of a BAD ATTITUDE''; applicant 154 ''nice kid,

did not join the Union''; applicant 120 ''asked about Union, probably not a good prospect.'' It is clear just from these notes that Project Manager Gremonprez looked on applicants with antiunion sentiments as favorable candidates for employment but viewed employees with prounion sentiments just the opposite in that they had bad attitudes and were unacceptable applicants for employment. Sixth, the Company failed to hire any of the jobsite experienced predecessor employees, with one exception, that being the only employee of the predecessor work force that had not joined the Union.

The Company continued to demonstrate its antiunion bias, unlawfully motivated hiring practices, and its preoccupation with the Union even after it had commenced performing the services called for in its grounds maintenance contract with the Air Force. For example, Project Manager Gremonprez told employees during the first week of their employment ''not to associate or talk with anyone with the Union.'' Consultant Potts highlighted the Company's hiring policies and practices by telling employees he did not want to hire the predecessor employer's work force, because they were Union.

The Company's strong antiunion bias, coupled with its determination not to become unionized is clearly indicated by Consultant Potts' statement to employees sometime between March 1 and May 19 that the Company was having problems with the Union, ''and that if we did go Union, he would not carry the contract on any longer.''

There are other indications the Company predetermined not to hire the unionized work force of its predecessor. I note the Company never availed itself of the opportunity to review the personnel files of the predecessor employees even though the Company was offered full access to such files by U.S. Contracting President Brands. I likewise note the Company failed to consider the experience levels of the U.S. Contracting employees and the many reference letters contained in their applications that were provided to the Company.

All the above establishes, as contended by the Government and Union, a very strong prima facie case that the Company predetermined not to hire any of the U.S. Contracting employees because of their membership in the Union and in order for the Company to avoid a bargaining obligation with the Union.

C. *The Company's Burden*

I find the Company failed to demonstrate it would have taken the same hiring actions it did in the absence of the predecessor employees' union affiliations. First, the Company failed to present evidence to demonstrate that any of the predecessor employees were not hired for lawful reasons. The Company said it was looking, for example, for clean cut, neat employees; however, Project Manager Gremonprez acknowledged that many of the predecessor employees were courteous, and exhibited good appearances, yet none, except the one nonunion applicant, was hired by the Company. The evidence is clear the Company did not uniformly apply its interpretation of a clean cut, neat appearance in that Project Manager Gremonprez asked some of those he had already hired to cut their hair and directed that certain of the male employees not wear ear jewelry while working. Further, although it conceded experienced tractor operators were needed, it bypassed the experienced and highly recommended pool of tractor operators among the predecessor employees. Additionally the Company ignored, without adequate explanation, the fact the predecessor employees had the necessary security clearances to work at the Cape. In this regard I note the Company had a very short time frame in which to hire a work force and it had been advised it would take time to obtain security clearances for employees other than the predecessor employees.

Simply stated, I find the Company unlawfully refused to employ the former U.S. Contracting employees because of their affiliation with the Union. Such violates Section 8(a)(3) and (1) of the Act and I so find.

D. *Recognition and Bargaining Obligation*

That the Company is a successor employer to U.S. Contracting was acknowledged by the Company in its posttrial brief, and as I have noted elsewhere in this decision, the evidence supports such an admission. Accordingly, I find the Company is a successor employer to U.S. Contracting.

The Board noted in *American Press*, 280 NLRB 937, 938 (1986),[37] ''When a successor has discriminated in hiring, it can be inferred that substantially all the former employees would have been retained absent the unlawful discrimination.'' Any uncertainty must be resolved against the wrong doer for to do otherwise would allow an employer to benefit from its own wrong doing. Thus I conclude and find that absent its unlawful hiring practices the Company would have hired substantially all, if not all, of the predecessor's work force, namely, the 18 individuals specifically named in the complaint and noted elsewhere in this decision.

The Company hired 26 employees as of March 1, which constituted a substantial and representative complement of its work force. The 18 predecessor employees that the Company unlawfully refused to hire would constitute a majority of the Company's work force in an admittedly appropriate unit.[38]

The Board in *Control Services*, 319 NLRB 1195 (1995), observed: ''It is well settled that a successor employer is obligated to recognize and bargain with the collective-bargaining representative of its predecessor's employees when the predecessor's employees comprise a majority of its work force and the collective-bargaining representative demands bargaining in an appropriate unit. *Fall River Dyeing Corp*., 482 U.S. 27 (1987).''

As noted above, but for the Company's unlawful discriminatory hiring practices, it would have hired, as a majority of its work force, the unionized employees of its predecessor.

An appropriate bargaining unit is admitted thus the only remaining question is did the Union demand bargaining? The Union, Local Union President Hill in particular, did not specifically make a bargaining demand of the Company. I am persuaded however, that Hill did, by his actions, implicitly demand recognition and when taken in conjunction with the Company's unlawful acts, and the Union's amended charge alleging the Company refused to recognize and bargain with

[37] See generally *AMI, Inc*., 319 NLRB 536 (1995).

[38] The admittedly appropriate unit is:

> All full-time and regular part-time lawn maintenance employees, including equipment mechanics, tractor operators, laborers, full-time temporary laborers, and lead persons; but excluding all other employees, managerial employees, clerical employees, guards and supervisors as defined in the Act.

it, no more need be required of the Union in order to obligate the Company to recognize and bargain with it as the employees' collective-bargaining representative.

Local Union President Hill learned during the second week in February that another contractor had been awarded the work previously performed by U.S. Contracting. He also learned from an Air Force representative that it was the Company here and that the Company was headquartered in Ohio. With location assistance from the telephone company Hill telephoned the Company at its Ohio headquarters. Hill told a Company representative that he, Hill, was president of the Local Union that represented the employees currently working under the contract at the Cape and ''asked him [the Company representative] to hire the existing work force.'' Local Union President Hill was told by the Company representative the Company was ''certainly not an anti-Union Company'' but hiring decisions had been placed in the hands of a local hiring authority in Florida, ''and he [the Company representative] would direct the local hiring authority to get in contact with [Hill] to discuss these things with [Hill].'' The Company's local hiring authority did not contact Hill. Hill again contacted the Company's Ohio offices on February 27 and told a Company representative he was president of the Local Union that represented the grounds maintenance employees at the Cape and he had spoken with them earlier about hiring the existing work force. Hill told the Company's representative he had never received a telephone call, although he was assured one would be forth coming, from the Company's local hiring authority. The Company's representative gave Hill Consultant Potts name and telephone number. President Hill telephoned Consultant Potts that same day (February 27) and told Potts he was president of the Local Union that represented the employees under the existing contract and asked Potts ''to hire the existing Union work force.'' Potts told Hill the Company's Ohio office had asked him to call Hill, but Potts said he had not had time to do so. Potts told Hill the hiring decisions had already been made. Hill asked if the Company hired the existing unionized work force and was told the Company only hired one the mechanic. Hill responded, ''you mean you hired the only guy out there who is not a member of the Union.''

The above actions and in actions of the Company demonstrates it was attempting to avoid contact with Local Union President Hill. Hill made it clear to the Company he was the president of the Local Union that represented the unit of employees in question, and he wanted the Company to hire the existing unionized work force. The Company did not, as promised, get in touch with Hill before its hiring decisions had been finalized. It is implicit in Hill's comments and actions that he was asking the Company to hire the existing work force *and recognize and bargain* with the Union. Any ambiguity that could conceivably have existed on that point was cleared up when on June 26, the Union filed a fourth amended charge, alleging the Company had failed and refused to recognize and bargain with the Union. As the Board in *Williams Enterprises*, 312 NLRB 937, 938 (1993), noted it has held ''that an 8(a)(5) charge, standing alone, can constitute a demand for recognition [footnote omitted].'' The Board in *Williams Enterprises* also concluded that an 8(a)(5) charge can also serve to clarify remarks that might otherwise be too vague to constitute a demand for recognition.[39]

Based on all the foregoing, I find the Company was obligated to recognize and bargain with the Union on and after March 1.

CONCLUSIONS OF LAW

1. Smith and Johnson Construction Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Transportation Workers Union of America, AFL–CIO, Local 525 is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed at Smith and Johnson Construction Company at Cape Canaveral Air Force Station Florida, as successor to U.S. Contracting, engaged in full-time and regular part-time lawn maintenance employees, including equipment mechanics, tractor operators, laborers, full-time temporary laborers, and lead persons; but excluding all other employees, managerial employees, clerical employees, guards and supervisors as defined in the Act constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive representative of all the employees in the above-described unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Smith and Johnson Construction Company is a successor employer to U.S. Contracting at Cape Canaveral Air Force Station Florida and, by since on or about March 1, failing and refusing to recognize and bargaining with the Union as the exclusive collective-bargaining representative of the employees in the above described unit, the Company violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to hire the employees named in paragraph 2(a) of this Order, because of their union affiliation, the Company in each instance engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by interfering with the exercise of their rights guaranteed in Section 7 of the Act and by discriminating in regard to their hire and tenure of employment thereby discouraging membership in a labor organization.

7. By interrogating employee applicants about their union membership, activities, and sympathies; by impliedly threatening employee applicants with reprisals because of their union membership, activities, and sympathies; by directing its employees not to talk to anyone about the Union; by directing its employees to report communications from any individuals concerning the Union to the Company and, by informing its employees it had refused to hire applicants, because of their membership in and activities on behalf of and sympathies for the Union, the Company violated Section 8(a)(1) of the Act.

8. These unfair labor practices affect commerce within the meaning of Section 2(6) (7) of the Act.

REMEDY

It having been found that the Company has engaged in certain unfair labor practices, it is recommended that it be or-

[39] Clearly after the fourth amended charge was filed there could be no doubt as to the Union's position.

dered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

I shall recommend the Company be required to offer the employees named in paragraph 2(a) of the Order employment in their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority, and other rights and privileges previously enjoyed, discharging if necessary, employees hired from sources other than U.S. Contracting to make room for them and make them whole for any loss of earnings they may have suffered due to the discrimination against them from March 1, 1995, until proper offers of employment are made, less net interim earnings as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), interest thereon shall be computed in accordance with the formula approved in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further I shall recommend the Company be required to recognize and bargain with Transport Workers Union of America, AFL–CIO, Local 525 in the appropriate bargaining unit and, if agreement is reached, to reduce the agreement to a written contract. In addition it is recommended the Company be ordered to remove from its files any reference to its unlawful refusal to hire the discriminatees named in paragraph 2(a) of the Order for its Cape Canaveral Air Force Station Florida location and notify them in writing that this has been done and that the refusals to hire them will not be used against them in any way. I also recommend the Company be ordered to post an appropriate notice to employees copies of which are attached hereto as ''Appendix,'' for a period of 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]